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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1964.

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SUPREME COURT, U.S.

No. 338 [redacted]

GEORGE F. MOHR and GENEVIEVE B. MOHR,
Petitioners,

v.

STATE HIGHWAY COMMISSION OF MISSOURI,
Respondent.

ANNIE PITTI,
Petitioner,

v.

STATE HIGHWAY COMMISSION OF MISSOURI,
Respondent.

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To The Supreme Court of Missouri.

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### QUESTION PRESENTED.

We feel that clarification of the question presented should be made to correspond with the facts presented to the Supreme Court of Missouri. We respectfully submit that the question presented is as follows.

When real estate abutting upon a highway, which consists of two surfaced roadways, has the right of access to one of the surfaced roadways and the highway is reconstructed so as to provide four surfaced roadways and the real estate retains unlimited right of access to the nearest adjacent surfaced roadway, has a compensable property right (right of access) been taken from the owner of the real estate?

## STATEMENT OF CASE.

Respondent has not been served with the printed record, therefore this statement is based upon the facts set out in the opinions attached to the petition of Petitioners.

### A. MOHR CASE

The following statement is applicable to the case of Petitioners Mohr as taken from the decision of the Missouri Supreme Court attached to Petitioners' Petition as Appendix A (pages 14 and 15 of Petition).

This was a condemnation proceeding brought by the State of Missouri at the relation of the State Highway Commission of Missouri to acquire right-of-way for the construction and maintenance of Interstate 70 in Warren County, Missouri. Commissioners appointed by the trial court pursuant to said proceeding awarded to Petitioners the sum of $15,000 and both Petitioners and Respondent appealed to a jury trial, which resulted in a verdict and judgment in favor of Respondent in the amount of $7,000.

Prior to the institution of the condemnation proceeding Petitioners owned a tract of land located on the south side of existing Route 40 in Warren County, Missouri. There was no restriction of access between Petitioners' property and the existing highway and Petitioners' property was afforded access to one surfaced roadway of the highway by means of two entrances. Route 40, as it existed at the time

of the institution of the condemnation proceedings, was what is commonly called a dual lane highway, having two concrete roadways or pavements. One pavement was 18 feet in width and carried two lanes of traffic in a westwardly direction, and the other pavement was 24 feet in width and carried two lanes of traffic in an eastwardly direction. These roadways were separated by an earthen median.

By the condemnation proceedings a small triangular tract there was no dispute between the parties as to the Petitioner's property at its northeast corner. The condemnation petition provided that no abutting property owner should have any right of direct access to the highway or its right-of-way "except that access will be permitted to any adjacent outer roadway to which access is not specifically prohibited by the special symbol denoting no right of access as shown on said plans". There was **no restriction of access between Petitioners' remaining property and the nearest adjacent surfaced roadway of the newly constructed highway** designated as the south outer roadway.

The reconstruction of the highway involves the construction of four surfaced roadways, all contained within one continuous right-of-way and all roadways being generally parallel with one another. The northernmost roadway is designated as an outer roadway and is designed to carry traffic in both directions. The next roadway to the south is designated as the westbound throughway and is designed to carry two lanes of traffic westwardly. The next roadway to the south is designated as a throughway and is designed to carry two lanes of traffic eastwardly. The southernmost roadway is designated as an outer roadway and is designed to carry one lane of traffic in each direction. All of the roadways will be separated from one another by means of an earthen median strip and there is no provision for traffic

on any roadway to enter onto another roadway of the highway except at designated interchanges. One interchange is located west of the Petitioners' property at the City of Warrenton and at this point traffic on any roadway can, by means of the enterchange, enter onto any other roadway. Another interchange will be located east of Petitioners' property at the City of Wright City and at that point traffic on any roadway of the highway can, by using said interchange, enter onto any other roadway of the highway.

In the trial court and in the appellate courts there was no dispute between the parties as to the Petitioners' right to compensation for the taking of the property of Petitioners and any damage to the remainder of Petitioners' property resulting from the taking. The dispute between the parties was whether or not, under the facts above set out as they were developed in evidence in the trial, Respondent had taken from Petitioners a compensable property right of access between their property and the highway.

## B. PITTI CASE

The following facts as set out by the Supreme Court of Missouri in its decision are applicable to the Pitti case.

This was a condemnation proceeding instituted by the State of Missouri at the relation of the State Highway Commission of Missouri to obtain right-of-way for the reconstruction of Route 67 in St. Louis County. Prior to the appropriation of the right-of-way Petitioner Pitti owned slightly more than one acre of land fronting on the west side of existing Highway 67, upon which Petitioner operated a motel. By the condemnation proceeding Respondent acquired right-of-way approximately 30 feet in width across the frontage of the Pitti property, along with a construction easement. Route 67 prior to reconstruction consisted of a two lane single roadway highway, to which Petitioner

had access. Upon reconstruction of the highway, the existing highway was replaced with four separate roadways which were separated from one another by means of an earthen median. The reconstructed highway consists of two two-lane throughways in the center, one throughway carrying two lanes of traffic in one direction and the other throughway carrying two lanes of traffic in the opposite direction. On each side of the throughway pavements are surfaced roadways designated as outer roadways, each of which will carry traffic in both directions.

Petitioner's property abuts upon and has unlimited access to the western outer roadway. Both outer roadways connect to the throughway pavements at designated points. (Pages 51 and 52, Petition of Petitioners).

In the trial court and in the Supreme Court of Missouri there was no dispute between the parties as to the Petitioner's right to compensation for the taking of the property of Petitioner and any damage to remainder of Petitioner's property resulting from the taking. The dispute between the parties was whether or not, under the facts above set out as developed in evidence at the trial, Respondent had taken from Petitioner a compensable property right of access between her property and the highway.

## ARGUMENT.

At the outset of this argument Respondent wishes to point out that it has no quarrel with the proposition that an abutting property owner's right of access to a public highway is a property right which, **if taken from him**, entitles him to compensation. Respondent did not take a position contrary to this at any stage of the proceedings in either of these cases. The Supreme Court of Missouri did not hold contrary to this proposition in either of these cases. In both cases the Supreme Court of Missouri recognized that the right of access which an abutting property owner has to and from the adjacent public highway is a property right and the Court further recognized that if that right of access were taken the owner would be entitled to compensation for its loss. The position which Respondent has taken throughout all proceedings in both of these cases is that, under the fact situations presented in both cases as developed in evidence, the property owners retained their right of access to the highway, did not lose any property right of access between their properties and the adjacent highway and therefore were not entitled to compensation for this particular element. That is the question ruled upon by the Supreme Court of Missouri in both of these cases. The premise upon which the Supreme Court decided these cases is quite clear in the opinions handed down by that Court. The Court stated in the **Mohr** case, "Of course, a complete blocking of an abutter's access takes from him a property right in the nature of an easement and this requires resort to eminent domain. However, ingress and egress to a particular lane of a highway and direction of travel thereon can be regulated under the police power of the State for public safety and general welfare, without compensation to an abutter who is furnished unrestricted right of access to a lane of the highway upon which his property abuts and

which connects with the restricted lanes at designated points. * * * In this case, Respondents have been furnished unrestricted access to a lane of the highway, an outer road on its right-of-way, along the entire front of their property. Therefore, any compensation resulting from this situation would have to be for circuity of travel rather than for loss of access to the highway." (Pages 17-18, Petition of Petitioners)

In the **Pitti** case, the Supreme Court of Missouri stated, "An abutting owner's property right of 'access' is better described as the right of ingress and egress to and from his property and the abutting public highway. The right also includes the further right to connect with or reach the system of public highways, which right is also subject to reasonable restrictions under the police power of the State in protecting the public and facilitating traffic. The right does not include the right to travel in any particular direction from one's property or upon any particular part of the public highway right-of-way because, after one is upon the highway he has the same right as all other travelers and the right of travel is a public right and controlled by the police power of the State. Nor does the right of ingress or egress to or from one's property include any right in and to the existing public traffic on the highway, or any right to have such traffic pass by one's abutting property. The reason is that all traffic on public highways is controlled by the police power of the State, and what the police power may give an abutting property owner in the way of traffic on the highway it may take away, and by any such diversion of traffic, the State and any of its agencies are not liable for any decrease of property values by reason of such diversion of traffic, because such damages are 'damnum absque injuria', or damage without legal injury. The trial court, therefore, erred in admitting evi-

dence of depreciation of the value of Respondent's property by reason of the diversion of traffic and the so called "loss of access'." (Pages 52-53, Petition of Petitioners). The Court in that case continued by stating, "Therefore, as far as Respondent and her property rights are concerned, she has the same right of ingress and egress from her remaining property to a highway right-of-way that existed before, but after she or her invitees enter upon the adjacent right-of-way of the highway they are subject to the same regulations, inconveniences and controls that govern all other members of the traveling public" (Pages 53-54 Petition of Petitioners).

Thus, from the above excerpts from the decisions of the Missouri Supreme Court in these two cases, it is obvious that Missouri adheres to the general rule that the right of access between adjacent property and a public highway is a property right which cannot be taken without compensation but the Court further recognized that what the Petitioners in this case were complaining of was not the fact that they would not be permitted to proceed from their property onto the adjacent public highway and thereupon exercise their public right of travel but were complaining that their properties would be decreased in value because the main stream of traffic would no longer be immediately adjacent to their properties so as to permit their commercializing upon this traffic. The facts in both of the cases were undisputed that there is no restriction on the Petitioners' rights to proceed from their property directly onto the nearest traveled roadway and vice versa. Also, there is no question but that once upon that roadway the Petitioners can exercise their public right of travel, subject to such police regulations as the State deems necessary to impose for public protection and welfare.

The rule expressed by the Supreme Court of Missouri

in these cases is not peculiar to the State of Missouri. The same rule has been expressed and applied by the appellate courts of other states.

**Arkansas State Highway Commission v. Bingham**, 231 Ark. 934, 333 S.W.2d 728;

**Pennysavers Oil Co. v. State of Texas**, 334 S.W.2d 546;

**State of Texas v. Baker Bros. Nursery**, 336 S.W.2d 212;

**Nettleton Co. v. State of New York**, 202 N.Y. Supp.2d 102;

**Muse v. Mississippi State Highway Commission**, 233 Miss. 694, 103 S.2d 839;

**State v. Fox**, 333 P.2d 943 (Wash.);

**Moses v. North Carolina State Highway Commission**, 261 N.C. 316, 134 S.W.2d 664.

This Court has recently ruled on a petition for Writ of Certiorari in a case almost identical in facts to the cases presented by the Petitioners herein. In the case of **Joseph E. Moses, et ux. v. North Carolina State Highway Commission, No. 490**, October Term 1964, this Court, on December 7, 1964, denied the property owner's petition for Writ of Certiorari applied for on the same question as involved in the instant case. **Moses v. North Carolina State Highway Commission**, 13 L. Ed.2d, 342.

This Court also denied a Writ of Certiorari in a case decided by the Missouri Supreme Court concerning a slightly different factual situation than here involved but involving the same legal principle. **Hill-Behan Lumber Co. v. State Highway Commission of Missouri**, 314 U.S. 636. The decision of the Supreme Court of Missouri in the **Hill-Behan Lumber Co.** case is reported in 347 Mo. 671, 148 S.W.2d 499. In that case the property owner originally had access to the throughway pavement of Page Avenue in St.

Louis County, Missouri. The State Highway Commission of Missouri constructed an overpass to carry the throughway pavement of Page Avenue over a railroad track. The pavement to which the property owner had originally had access was removed and in its stead a new elevated pavement was constructed to carry through traffic. The physical feature of this reconstruction was such that the property owner could no longer have direct access from its property onto the main throughway pavement. Instead, the reconstruction provided a ramp alongside the main pavement constructed within the limits of the original right-of-way of the public way but outside of the area which had formerly been occupied by the throughway pavement, to which ramp the property owner had access. The property owner brought proceedings to collect compensation for loss of access to the existing public way. The Supreme Court of Missouri ruled that the property owner had not lost any right of access for which it was entitled to compensation and this Court denied a Writ of Certiorari on petition of the property owner.

The highway involved in the **Mohr** case is a part of the national system of interstate and defense highways designated and constructed pursuant to an act of Congress of the United States contained in **23 U.S.C.A.**, Sec. 103. That the loss, if any, of which the Petitioners in the instant case complain is not a property right is fully demonstrated by the regulations of the Bureau of Public Roads of the United States Department of Commerce, promulgated pursuant to the Federal Aid Highway Act. Paragraph 6(k) of **Policy and Procedure Memorandum 21-4.1** issued by the Bureau of Public Roads of the United States Department of Commerce, December 30, 1961, as amended October 7, 1963, by Policy and Procedure Memorandum 21-4.1(3) provides:

"k. Payments made for personal property, loss of busi-

ness or good will, **circuity of travel and diversion of traffic,** or any items of damage not generally compensable in eminent domain are not considered eligible for federal participation; nor will said funds participate in payments made for loss or impairment of access so long as the landowner retains or is furnished reasonable access to an existing public highway **to a frontage road,** or to any other part of the public highway system. Reasonable access shall be determined in all cases without regard to circuity of travel or diversion of traffic within the public highway system." (Emphasis ours).

From this provision it would appear that the generally accepted principle of law is that if a property owner is allowed access to one traveled roadway of a dual- or multi-roadway facility, he is not entitled to compensation for loss of access merely because he does not have access to each and every traveled roadway of the highway facility.

## CONCLUSION.

From the foregoing statement of the case and the discussion of the priciples upon which the Petitioners' cases were decided by the Supreme Court of the State of Missouri, it is shown that Petitioners did not have taken from them a property right of access to the public highways for which they are entitled to compensation, but instead their claim for damages is based upon a diversion of traffic rather than a loss of the property right of access. Respondent therefore respectfully submits that the petition for Writ of Certiorari to the Supreme Court of Missouri should be denied.

Respectfully submitted,

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